

IN THE SUPREME COURT OF MISSOURI

Supreme Court No.: SC 84933

LAURA J. LANDMAN

Employee/Respondent

vs.

ICE CREAM SPECIALTIES, INC.

Employer/Appellant,

and

OLD REPUBLIC INSURANCE COMPANY

C/O CRAWFORD & COMPANY

Insurer/Appellant

and

TREASURER OF THE STATE OF MISSOURI
AS CUSTODIAN OF THE SECOND INJURY FUND

Additional Party/Respondent

SUBSTITUTE RESPONDENT'S BRIEF
ON BEHALF OF THE SECOND INJURY FUND

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TABLE OF CONTENTS

TABLE OF CASES AND OTHER AUTHORITIES	2
Cases	2
Statutes	3
STATEMENT OF FACTS	4
ARGUMENT	22
CONCLUSION	41
CERTIFICATE OF SERVICE	42

	<u>TABLE OF CASES AND OTHER AUTHORITIES</u>
Cases	

<i>Brown v. Treasurer of Missouri</i> , 795 S.W.2d 479 (Mo.App. 1990)	25
<i>Boring v. Treasurer of Missouri</i> , 947 S.W.2d 483 (Mo.App. E.D. 1997)	32, 33
<i>Bruflat v. Mister Guy, Inc.</i> , 933 S.W.2d 829 (Mo.App. W.D. 1996)	23, 29, 39
<i>Carlson v. Plant Farm</i> , 952 S.W.2d 369 (Mo.App. W.D. 1997)	38
<i>Carron v. Ste. Genevieve School Dist.</i> , 800 S.W.2d 64 (Mo.App. E.D. 1990)	23
<i>Davis v. Research Medical Center</i> , 903 S.W.2d 557 (Mo.App. W.D. 1995) .	22, 23, 29, 39
<i>Fisher v. Archdiocese of St. Louis</i> , 793 S.W.2d 195 (Mo.App. E.D. 1990)	25
<i>Garibay v. Treasurer of Missouri</i> , 930 S.W.2d 57 (Mo.App. E.D. 1996)	38
<i>Gilley v. Raskas Dairy</i> , 903 S.W.2d 656 (Mo.App. E.D. 1995)	23
<i>Hughey v. Chrysler Corp. and Treasurer of Missouri</i> , 34 S.W.3d 845 (Mo.App. E.D. 2000)	26, 27, 34, 35, 37, 38, 40
<i>Kizior v. Trans World Airlines</i> , 5 S.W.3d 195 (Mo.App. W.D. 1999)	35
<i>Kowalski v. M-G Metals and Sales, Inc.</i> , 631 S.W.2d 919 (Mo.App. 1982)	24, 25
<i>Messex v. Sachs Electric</i> , 989 S.W.2d 206 (Mo.App. E.D. 1999)	38
<i>Moorehead v. Lismark Distrib. Co.</i> , 884 S.W.2d 416 (Mo.App. E.D. 1994)	26, 33, 34
<i>Reiner v. Treasurer of Missouri</i> , 837 S.W.2d 363 (Mo.App. S.D. 1992)	25
<i>Roller v. Treasurer of State of Mo.</i> , 935 S.W.2d 739 (Mo.App. S.D. 1996).	26, 29, 35
<i>Searcy v. McDonnell Douglas Aircraft Co.</i> , 894 S.W.2d 173 (Mo.App. E.D. 1995)	27
<i>Sellers v. Trans World Airlines, Inc.</i> , 776 S.W.2d 502 (Mo.App. 1989)	25
<i>Talley v. Runny Mead Estates, Ltd.</i> , 831 S.W.2d 692 (Mo.App. E.D. 1992)	25
<i>Vaught v. Vaughnts, Inc.</i> , 938 S.W.2d 931 (Mo.App. S.D. 1997)	26, 33, 34

Willis v. Jewish Hosp., 854 S.W.2d 82 (Mo.App. E.D. 1993) 23

Wuebbeling v. West County Dry Wall, 898 S.W.2d 615 (Mo.App. E.D. 1995) 38

Statutes

§287.020.7, RSMo (2000) 24

§287.200, RSMo (2000) 26

§287.220, RSMo (2000) 24, 25, 35, 37, 38, 40

§287.495, RSMo (2000) 22, 23, 29

STATEMENT OF FACTS

Claimant's Testimony

Claimant was born on September 13, 1964 and graduated from high school in 1982. (Tr.13). Claimant worked for K-Mart while in high school, first as a cafeteria worker and then as a cashier. (Tr. 14). As a cafeteria worker, her duties included cleaning the work area, waiting on customers, and working the grill and fryers. (Tr. 14). Claimant stood on her feet the entire shift and was required to lift objects ranging in weight from several ounces to 50 pounds. (Tr. 15). As a cashier, Claimant checked customers, lifted items from the cart into the bags and stood the entire shift. (Tr. 15).

Claimant was hired part-time at ICS, which makes novelty ice cream bars and popsicles, in March 1982. (Tr. 16). She was laid off briefly in 1982, but returned on a full-time basis later that year or early 1983. (Tr. 17). She then worked full-time exclusively at ICS through March 17, 1999. (Tr. 16-17; 77).

Claimant first worked at ICS as a packer for approximately one year. (Tr. 17). Claimant had no problems performing her job duties as a packer. (Tr. 74). Claimant then worked continuously as a machine operator in that capacity from 1983 until 1999. (Tr. 17). Claimant worked eight-and-a-quarter hours each shift, five to six days per week. (Tr. 17-18). Claimant worked overtime approximately 80% of the time. (Tr. 18). As of February 27, 1999, the maximum amount of hours Claimant would work for any given week was 60 hours. (Tr. 77).

As a machine operator, Claimant's duties included preparing popsicle mix for the popsicle machine, carrying supplies to the Arctic Flow machine, making sure the area around the machine was kept clean at all times, and fixing any machine jams. (Tr. 19; 76-

77). To prepare the popsicle mix, Claimant climbed steep steps while carrying ingredients which weighed up to 50 pounds. (Tr. 19). Claimant climbed up and down the steps every two hours. (Tr. 76). Claimant carried and handled rolls of paper weighing about 50 pounds and lifted the rolls of paper every 45 minutes. (Tr. 77). Claimant also secured other supplies for the machine, such as cartons and sticks. (Tr. 20). Claimant was on her feet most of the shift, except during regularly scheduled breaks. (Tr. 20-21). Claimant had to clean up spills and jams on or about the machines; she used heavy hoses that weighed about 25 pounds. (Tr. 21). Claimant spent 80% of her shift lifting objects. (Tr. 23).

Claimant did not engage in any type of repetitive lifting at home. (Tr. 23). Claimant did not stand for long periods of time at home or away from work. (Tr. 23).

July 26, 1997 Injury

On July 26, 1997, Claimant was relieving a co-worker when another employee came by carrying some trash. (Tr. 24). When Claimant tried to step out of the way, she tripped on a wire and fell onto the concrete floor. (Tr. 24). Claimant twisted her right ankle, landed on her left side, and felt pain in her left leg and left shoulder. (Tr. 24). Claimant notified a supervisor and sat in the lunchroom until the end of the shift. (Tr. 24). A co-worker drove her home. (Tr. 25). That night, Claimant sought medical treatment at BarnesCare, as authorized by ICS. (Tr. 25). Claimant underwent x-rays, received medication, and was taken off work. (Tr. 25).

After receiving initial treatment from BarnesCare, Claimant eventually returned to work. (Tr. 25). At that time, Claimant had bruises on her left shoulder, swelling in the left

leg, and discoloration in the right ankle. (Tr. 25-26). Claimant testified that she continues to have complaints referable to her left shoulder. (Tr. 26). Claimant had no prior or subsequent injury to her left shoulder other than the July 26, 1997 injury. (Tr. 26).

Claimant eventually sought treatment for her left shoulder from Dr. Dusek, through a referral from her family physician, Dr. Mammen. (Tr. 26). Dr. Dusek took x-rays on August 11, 1999 and an MRI and arthrogram were performed on October 8, 1999. (Tr. 27; 541; 545-546). Dr. Dusek also prescribed physical therapy, which took place from approximately October 19, 1999 through March 3, 2000. (Tr. 27; 550-555; 562-563; 569). On January 25, 2000, Dr. Dusek attempted to perform arthroscopic surgery on Claimant's left shoulder, but was unable to perform the procedure. (Tr. 27; 568).

Claimant continued to have swelling and bruising on her left leg after her release from BarnesCare. (Tr. 30). She also had a lesion so she sought treatment from Dr. Mammen, who prescribed water pills. (Tr. 30; 31-32). The lesion went away within 3 to 4 months but opened up again in May 1998. (Tr. 32). Claimant was again treated by Dr. Mammen and Dr. Lee and that lesion went away within 2 to 3 months. (Tr. 32). Claimant was referred to Dr. Carmody to rule out a thyroid disorder. (Tr. 33). Claimant was released from further treatment for the 1998 flare-up by Dr. Carmody, Dr. Lee, and Dr. Mammen. (Tr. 33).

Following the July 1997 injury, Claimant continued to work, but required assistance from co-workers to lift objects overhead because of her left shoulder. (Tr. 31, 66-67). Claimant testified that she did not require assistance from co-workers prior to the 1997

injury and was able to perform all other aspects of her job. (Tr. 31). Claimant testified to ongoing difficulties with her left shoulder, including pain, limited range of motion, problems lifting objects overhead, and trouble dressing and grooming herself. (Tr. 49, 61, 70). Claimant testified that the condition of her left shoulder included weakness, pain, and decreased range of motion, and that the condition worsened in July 1999 (following the February 27, 1999 primary injury). She testified that the deterioration came from not being able to use her left shoulder. (Tr. 83).

In addition to discussing her shoulder, Claimant testified about symptoms in her legs prior to July 26, 1997. Claimant first had symptoms in her legs in 1995 when she developed a wound on her left leg and went to Dr. Mammen. (Tr. 28). Dr. Mammen treated her leg with ointments and the wound closed up within a month or two. (Tr. 28-29).

In September 1996, Claimant had another lesion on her left leg and was treated by Dr. Mammen and Dr. Lee. (Tr. 29). Dr. Lee prescribed an ointment, water pills, and soaks, and the lesion went away. (Tr. 29). On October 5, 1996, Dr. Lee's diagnosis was resolving stasis dermatitis with completely healed stasis ulcer. (Tr. 414). Claimant testified that she did not have any other left leg problems before July 26, 1997. (Tr. 29-30). Claimant did not miss any time from work from 1993 to 1997 because of swelling or lesions on her legs. (Tr. 64). Claimant never had any problems performing her job because of swelling and lesions in her legs from 1993 to 1997. (Tr. 64). Claimant did not miss any time from work between the 1997 injury and the primary 1999 injury. (Tr. 65).

Claimant believed she worked slower because of swelling and lesions in her legs from 1993 to 1997. (Tr. 64). Before February 1999, Claimant had difficulties climbing the steps to make the popsicle mix because of her legs. (Tr. 70). Nevertheless, Claimant had never been dismissed or demoted for failing to perform her job properly at ICS. (Tr. 75). Claimant was never denied overtime because of being physically unable to complete her job duties at ICS leading up to February 27, 1999. (Tr. 75).

Claimant was off work for 2 weeks following the 1997 injury. (Tr. 82). Following her recuperation, Claimant returned to regular duties at ICS as a machine operator. (Tr. 82).

Primary February 27, 1999 Injury

In the month or two before February 27, 1999, Claimant did not have any lesion on her left leg in the shin area. (Tr. 34). On that day, Claimant was going to give another employee a break. (Tr. 33). Claimant stepped over a metal bar, her right foot slipped in oil and her left leg hit the metal bar. (Tr. 33, 77). A deep purple bruise instantly developed on Claimant's left lower leg, in the shin area, and she had pain in the area. (Tr. 33-34). A lesion developed on Claimant's left lower leg in the area injured on February 27, 1999. (Tr. 34). The lesion has been present up until the hearing date. (Tr. 34).

After the February 1999 injury, Claimant first treated with Dr. Mammen. (Tr. 34). Claimant noticed that the left leg wound had opened up and was leaking green fluid. (Tr. 34). Dr. Mammen kept Claimant off work, prescribed strong antibiotics, and referred her to Dr. Beckman. (Tr. 35). Claimant received treatment with Dr. Mammen, Dr. Beckman, Dr. Squitieri, and Dr. Altsheler for the February 27, 1999 injury. (Tr. 37). Since February 27,

1999, the lesion that developed on Claimant's left leg has continued, persisted, and has never actually closed up completely. (Tr. 37). Standing too long causes the left leg to swell and force the lesion open. (Tr. 37). The left leg lesions prior to February 27, 1999 always closed up even though Claimant was constantly on her feet. (Tr. 37-38). Claimant stopped working on March 17, 1999 because of an infection in the open wound that developed on her left leg after the February 27, 1999 injury. (Tr. 77).

Claimant testified regarding her ability to function prior to the primary February 27, 1999. Claimant was then able to prepare her own meals and did most of the cooking and cleaning. (Tr. 46-47; 60). And she did all of the grocery shopping; now she must rely on her husband to do the shopping. (Tr. 60). Claimant no longer prepares her own meals because she is unable to stand on her feet for long without having swelling and pain. (Tr. 46-47). Claimant complains of burning pain in her legs in the area of the open lesions. (Tr. 52). The pain is increased by certain activities. (Tr. 52-53). Claimant also complains of increased swelling with certain activities. (Tr. 53). Claimant can walk about ten minutes before her leg pain intensifies. (Tr. 53). Claimant has increased pain with walking 15 to 20 feet and no longer walks on her treadmill. (Tr. 53).

Claimant is unable to walk or stand without having her legs wrapped in some manner or wearing compression stockings. (Tr. 54). Claimant requires assistance from her husband to put on the compression stockings. (Tr. 41). On some days, Claimant is unable to put on the compression stockings, even though she attempts to put them on early in the morning. (Tr. 41). Claimant uses a compression pump, prescribed by Dr. Squitieri, for half an hour in

the morning and half an hour in the evening. (Tr. 54; 78). Claimant was never prescribed a compression pump by any of the doctors that treated her legs prior to February 27, 1999. (Tr. 78). The compression pump process helps relieve the symptoms, but the swelling returns once Claimant gets up on her feet. (Tr. 54).

Claimant spends the entire day sitting on the couch with her feet constantly elevated. (Tr. 61, 79). The longest she can stand before her leg pain gets too bad is five minutes. (Tr. 55).

Leading up to February 27, 1999, Claimant had no difficulties sitting. (Tr. 79). Currently, Claimant has difficulties sitting without having her feet elevated and can only sit for about five minutes before she must elevate her feet above her hips. (Tr. 55). Currently, Claimant can sit for a maximum of five minutes before she needs to change positions. (Tr. 79).

Since the February 27, 1999 injury, Claimant is unable to bend from the waist down, stoop, or kneel because of difficulties with her legs. (Tr. 78-79). Claimant has difficulties lifting with her right arm because of her legs. (Tr. 55-56).

At the time of the hearing, Claimant had a lesion on her right leg. (Tr. 56). The right leg lesion opened up at the site of the red spot that developed after the 1997 right ankle injury. (Tr. 57). Claimant testified that the lesion did not open up until after February 27, 1999. (Tr. 74).

Claimant had no difficulties driving prior to the 1997 injury. (Tr. 57-58). Claimant currently limits her driving and only occasionally drives to pick her daughter up from school. (Tr. 57).

Claimant was still treating with Dr. Altsheler for her legs at the time of the hearing. (Tr. 61). That treatment included use of the compression pump twice per day, compression stockings, water pills, antibiotics, and creams or ointments. (Tr. 61).

Prior to the July 1997 injury, Claimant weighed around 260 to 275 pounds. (Tr. 44). Claimant's weight remained in this range up until July 1998. (Tr. 44). Claimant is 5 feet 6 inches tall. (Tr. 44). Prior to July 1997, Claimant experienced shortness of breath, but it did not affect her ability to work. (Tr. 71). Claimant never missed any work leading up to February 27, 1999 because of her weight. (Tr. 80).

In July 1998, Claimant joined a Weight Watchers program and participated in an exercise program which consisted of frequent walks 3 to 4 times a week for about half an hour at a time. (Tr. 44). Claimant would walk around her subdivision, measuring a distance of a mile. (Tr. 44). Claimant walked on a treadmill when weather precluded walking outdoors. (Tr. 44). Claimant successfully lost weight when she participated in the diet and exercise programs. (Tr. 44). Prior to the February 27, 1999 injury, Claimant had lost 50 pounds and weighed 225 pounds. (Tr. 44-45).

As of February 27, 1999, Claimant was under no permanent work restrictions from any doctor because of her weight. (Tr. 80). Although Claimant believed her shortness of breath might have slowed her down at work, she no longer experienced shortness of breath

at work after her weight loss. (Tr. 71-72). Claimant has been unable to walk since February 27, 1999 and was instructed by Dr. Altsheler not to resume a walking program. (Tr. 45). Claimant slowly gained weight since February 27, 1999, which she has attributed to her inability to continue walking and having to sit with her feet constantly elevated. (Tr. 46).

Claimant has no family members with a similar leg condition. (Tr. 23).

Medical Testimony

Dr. Paul Altsheler

With regard to the February 27, 1999 injury, Claimant sought treatment from Dr. Paul Altsheler. Dr. Altsheler is board certified in internal medicine and his practice is split between nephrology and general internal medicine. (Tr. 262-63). Dr. Altsheler described nephrology as the study of the kidney and its related disorders, largely hypertension and disorders of fluid retention. (Tr. 263). Due to his specialty, Dr. Altsheler has treated numerous patients with venous stasis conditions and edema of the extremities and various portions of the body. (Tr. 263). Dr. Altsheler did not recall ever having examined anyone else for a workers' compensation case. (Tr. 264). Dr. Altsheler never provided any expert deposition testimony for purposes of workers' compensation litigation. (Tr. 264-265).

Dr. Altsheler first saw Claimant on March 29, 2000. (Tr. 263). Since the initial visit, Dr. Altsheler has continued to treat Claimant for her leg condition and non-healing wounds. (Tr. 272). Dr. Altsheler ultimately filled out a form so that Claimant could get a disabled license plate due to her venous stasis condition. (Tr. 272). Dr. Altsheler explained that

Claimant is unable to walk an extended distance and she is unable to move easily because of pain in her knees and ankles. (Tr. 272-73).

Dr. Altsheler issued a report based upon his initial March 29, 2000 evaluation. (Tr. 274). As of that time, Dr. Altsheler referred to a primary lesion on the left leg at the shin which related back to the lesion that developed after the February 27, 1999 injury. (Tr. 283-84). Based upon a variety of tests Dr. Altsheler performed, he concluded that Claimant suffered from chronic venous stasis disease with secondary post traumatic complicating recurrent ulcer formation with cellulitis related to her employment with ICS. (Tr. 288-93).

Dr. Altsheler testified that Claimant's 17 plus years working for ICS was a substantial factor in the cause of her leg condition. (Tr. 292). Dr. Altsheler could not determine anything else that contributed meaningfully to Claimant's current condition. (Tr. 292-93). Based upon a variety of medical tests, Dr. Altsheler excluded any other disease or condition as the cause for Claimant's condition. (Tr. 275-87). While Claimant's obesity might have been a factor in the venous stasis disease, Claimant's work at ICS was a substantial factor in the cause of her venous stasis disease. (Tr. 347-48). According to Dr. Altsheler, practically speaking, he doubted that obese patients are uniquely predisposed to the development of venous incompetence. (Tr. 337-38).

Due to the condition of Claimant's legs following February 27, 1999, she has limitations which include being physically unable to maintain an upright posture. (Tr. 293). Dr. Altsheler observed that the edema in the lower extremity and the oozing from the

wound would be worse in the course of an examination when Claimant was standing up. (Tr. 293).

Dr. Altsheler opined that Claimant is “quite literally paralyzed by this particular process.” (Tr. 292-93). Dr. Altsheler testified that anything Claimant does increases the pressure in her chest, which then increases the pressure in the veins of both her chest and lower extremities, thereby perpetuating her problem. (Tr. 292-94). This would be true with normal sitting, walking, standing, and any gravity assisted stress situations such as coughing, sneezing, lifting, bending, stooping, or anytime Claimant does not have her feet up in the air. (Tr. 293-94).

Dr. Altsheler opined that Claimant has been unable to work since March 17, 1999 based upon the work related venous stasis condition of her legs. (Tr. 294-95). Moreover, Dr. Altsheler opined that Claimant is permanently and totally disabled as a result of the venous condition alone. (Tr. 314). Dr. Altsheler testified that Claimant did not have overt swelling before the February 27, 1999 injury and left leg abrasion. (Tr. 335-36). Subsequent to the February 27, 1999 injury, Claimant developed swelling and weeping associated with the wound, followed by tissue reactivity and inflammation, and local swelling. (Tr. 335-36).

It was Dr. Altsheler’s understanding that Claimant was working full time for ICS as of February 27, 1999, performing duties that included lifting up to 50 pounds, standing for long periods of time, walking, and ascending and descending steps. (Tr. 340). Dr. Altsheler further testified that Claimant sustained a traumatic injury on February 27, 1999 and

subsequent to that incident, developed a non-healing ulcer wound on her left lower extremity, below the knee and in the shin area. (Tr. 340-41). Dr. Altsheler testified that the venous stasis condition is one that develops over time but is still a condition that can involve periods of being asymptomatic as well as other periods when it can be triggered by a certain type of event and thereby become traumatic and more symptomatic. (Tr. 341). Even a minor traumatic injury, specifically the February 27, 1999 incident, caused the non-healing wound to develop on Claimant's left leg. (Tr. 342-43).

The ALJ found that the venous stasis condition of Claimant's leg was a work-related condition, and as such, it manifested different symptoms throughout Claimant's employment at ICS beginning in 1995, but that it did not act as a hindrance to or an obstacle to working prior to July 21, 1997. (A. 18). The Commission unanimously affirmed this decision. (A. 21).

Dr. Robert Poetz

Dr. Poetz rated Claimant on one occasion, July 29, 2000, on Claimant's behalf. (Tr. 171-172, 224). Dr. Poetz did not provide any medical treatment to Claimant, rather, he only generated a report dated September 1, 2000. (Tr. 172; 226).

Dr. Poetz performs workers' compensation evaluations on behalf of claimants as part of his medical practice. (Tr. 224-25). Dr. Poetz had no follow-up with Claimant since his July 29, 2000 evaluation and was unaware of her current condition. (Tr. 226). Dr. Poetz did not consult any of Claimant's treating doctors in rendering his opinions. (Tr. 226). Dr.

Poetz is not board certified in nephrology or dermatology, nor is he a vocational expert. (Tr. 226-227).

Dr. Poetz obtained a history from Claimant regarding her leg problems. (Tr. 238-40). The problems included pain with walking which significantly increased if she walked 15 to 20 feet, increased pain with any standing with a maximum tolerance of 20 minutes, increased pain with sitting for 5 minutes with her feet elevated and 15 minutes maximum while sitting without her feet elevated, increased pain with lifting (using either arm) that causes straining, daily use of a compression pump, limited endurance, frequent urination due to water pills, and difficulty driving or riding in a car. (Tr. 29-30).

Dr. Poetz testified that after the July 1997 left shoulder injury, Claimant returned to regular work duties as a machine operator. (Tr. 216). As of February 27, 1999, she was working on a full time basis as a machine operator. (Tr. 216). As of February 27, 1999, Claimant was not under any permanent restrictions because of her legs. (Tr. 216-17). Just prior to bumping her left leg on February 27, 1999, Claimant did not have any open sore or ulcer on either leg. (Tr. 217). Dr. Poetz testified that Claimant then bumped her left leg on a metal shelf on February 27, 1999, developed a bruise, and that bruise developed into a non-healing wound. (Tr. 215). Dr. Poetz agreed that a compression pump was never recommended nor prescribed prior to February 27, 1999. (Tr. 218). Dr. Poetz further testified that since the February 27, 1999 left leg injury, Claimant has been prescribed the use of the compression pump and has been limited to a sedentary physical position with the need to elevate her legs for a majority of the day. (Tr. 218).

Dr. Poetz opined that Claimant had a pre-existing condition of venous stasis in both legs as of the July 1997 injury resulting in 20% permanent partial disability of the right and left lower extremities. (Tr. 201-03). Dr. Poetz opined that Claimant sustained a 40% permanent partial disability to the left shoulder as a result of the July 1997 injury. (Tr. 203). Dr. Poetz opined that Claimant sustained 10% permanent partial disability of the left lower extremity due to the February 27, 1999 injury. (Tr. 202). He opined that Claimant had 15% permanent partial disability of the Body as a Whole referable to obesity preexisting July 26, 1997. (Tr. 202-04).

While Dr. Poetz provided an opinion regarding prior obesity, he did not recall Claimant giving him any history of her participation in a Weight Watchers Program, that she stopped participating in the program after February 27, 1999, details of her exercise routine leading up to February 27, 1999, nor any kind of history of Claimant's level of physical activity leading up to February 27, 1999 (i.e., walking or use of a treadmill). (Tr. 218-19).

Vocational Testimony

James England

Mr. England, a vocational expert, evaluated Claimant on April 3, 2000 on Claimant's behalf. (Tr. 148). He generated a report dated April 12, 2000. (Tr. 148).

Claimant's history to Mr. England was that since February 27, 1999, she has been unable to be on her feet comfortably for more than 5 or 10 minutes at a time and she cannot walk more than about 2 blocks. (Tr. 127). Claimant did not report any specific problems

regarding her ability to drive leading up to February 27, 1999. (Tr. 128). Claimant did not tell Mr. England about her level of daily exercise leading up to February 27, 1999 or the treadmill she used as of Christmas 1998. (Tr. 130-31). Claimant did not report to Mr. England, one way or another, about any problems bending, twisting, kneeling, or stooping prior to February 27, 1999. (Tr. 132).

Mr. England testified that the following limitations based upon Claimant's primary leg condition would affect her ability to engage in activities or certain jobs: increased pain if she walks more than 15-20 feet; increased pain with standing at all with maximum tolerated standing of 20 minutes; increased pain when sitting for 5 minutes without her feet elevated; 15 minutes maximum tolerated sitting without her feet elevated; increased pain with lifting that causes straining; having to use a compression pump twice daily; limited endurance; and occasionally taking a water pill and having to relieve herself frequently during the day as a result of that medication. (Tr. 107-08). Mr. England testified that Dr. Altsheler treated Claimant for her leg condition and that based upon Dr. Altsheler's restrictions, Claimant would be limited to less than a full range of sedentary activity. (Tr. 109-10, 134).

Mr. England testified that in order to do a full range of sedentary work, a person would have to be able to sit as much as 6 hours out of an 8 hour work day. And it normally involves bimanual dexterity. (Tr. 108-09). Sedentary work also usually involves being up on one's feet for an hour or two out of a work day. (Tr. 109).

With regard to Claimant's leg condition, she cannot sit in a regular chair because even just sitting with her legs down in front of her does not work. (Tr. 109). Mr. England did not know of any job in which Claimant would be able to keep her legs elevated throughout the work day. (Tr. 111). He further testified that the ability to keep her legs elevated is not available in the open labor market. (Tr. 109). Mr. England believed Claimant was permanently and totally disabled and unable to compete in the open labor market. (Tr. 111-12).

Mr. England testified that the predominant factor in Claimant being permanently and totally disabled is the limitation associated with her leg. (Tr. 135). Mr. England noted that the need to use a compression pump twice daily and keeping the legs elevated for the majority of the day is not an option that is available in the open labor market for sedentary jobs. (Tr. 134-35). When asked to consider Claimant's limitations, problems, the need for the compression pump, the need to keep her legs elevated for the majority of the day since February 27, 1999, and the limitations of jobs available in the open labor market that can accommodate that extent of limitations, Mr. England did not think there was a job Claimant could perform which her prior conditions (obesity and left shoulder) would prevent her from doing. (Tr. 135).

The Commission's Decision

With regard to the July, 1997 claim, the Commission unanimously affirmed the decision of the ALJ which found Employer responsible for 40% permanent partial disability of the left shoulder. (A. 17-18; 21). The ALJ found that Claimant had 12.5% pre-

existing permanent partial disability of the Body as a Whole due to obesity and therefore, the Second Injury Fund was found responsible for 7.2 weeks of disability based upon the combination of pre-existing and primary disabilities. (A. 18-19). The ALJ found that the venous stasis condition in Claimant's leg did not act as a hindrance or obstacle to working prior to July 21, 1997. (A. 18).

With regard to the primary February, 1999 claim, the Commission unanimously affirmed the ALJ's decision which found Employer responsible for permanent total disability. (A. 48; 49). The ALJ found that the pre-existing left shoulder and obesity conditions were hindrances or obstacles to employment or reemployment in the open labor market. However, the primary injury and occupational disease of venous stasis was so severe that Claimant is unable to compete in the open labor market due to that condition considered alone. (A. 48).

Employer and Claimant appealed both claims to the Commission. With regard to both claims, the Commission was unanimous in its decision that the award of the ALJ is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. (A. 21; 49). Employer and Claimant subsequently appealed both claims to the Court of Appeals. The Second Injury Fund did not appeal.

The Court of Appeals found that the Commission's determination that the last injury was the occupational disease of venous stasis, that it was caused by work conditions, that it became a compensable injury in 1999 and that it alone caused Claimant's permanent total disability was supported by substantial evidence. (A. 62-63).

ARGUMENT

The testimony of Claimant, credible medical findings of Dr. Altsheler, and vocational testimony of Mr. England overwhelmingly support the finding of the Commission and the Court of Appeals that Claimant is permanently and totally disabled as a result of the primary February 27, 1999 injury involving the debilitating venous stasis condition alone and that Employer is liable for that disability.

Standard of Review

The standard of review in workers' compensation cases is set forth in §287.495, RSMo. (2000). In the absence of fraud, factual findings made by the Commission within its powers are conclusive and binding. *Id.* The court on appeal shall review only questions of law and may disturb the Commission's award only, for purposes relevant here, if the Commission acted without or in excess of its powers, or there was not sufficient evidence in the record to warrant the making of the award. *Id.*

When reviewing the record, the court views the evidence and legitimate inferences therefrom in a light most favorable to the Commission's award, and affirms the award if the Commission's decision is supported by competent and substantial evidence and is not clearly contrary to the overwhelming weight of the evidence. §287.495 RSMo. 2000; *Davis v. Research Medical Center*, 903 S.W.2d 557, 571 (Mo.App. W.D. 1995). The weight of the evidence and conflicts in the evidence are for resolution by the Commission,

and the reviewing court must not substitute its judgment on issues of fact, even if the court would have reached a different initial conclusion. *E.g.*, *Willis v. Jewish Hosp.*, 854 S.W.2d 82, 84 (Mo.App. E.D. 1993); *Carron v. Ste. Genevieve School Dist.*, 800 S.W.2d 64, 67 (Mo.App. E.D. 1990).

Furthermore, the Commission is the final arbiter of fact, as well as the sole judge of the credibility of witnesses and may disbelieve the testimony of any witness, even if the testimony is uncontradicted and unimpeached. §287.495 RSMo 2000; *Carron*, 800 S.W.2d at 67. Particularly, the Commission may reject medical opinions that do not have sufficient basis to be probative. *Gilley v. Raskas Dairy*, 903 S.W.2d 656, 658 (Mo.App. E.D. 1995). The Commission's determination that one of two competing medical opinions is correct is binding on appeal. *Bruflat v. Mister Guy, Inc.*, 933 S.W.2d 829, 835 (Mo.App. W.D. 1996). Finally, when the Commission affirms or adopts the findings and award of the Administrative Law Judge, the resulting consistency is a powerful factor in favor of upholding the Commission's award on appeal. *Davis*, 903 S.W.2d at 571.

I. The finding of the Commission that Employer is liable for permanent total disability as result of the last injury and occupational disease of venous stasis alone is supported by the competent and substantial evidence in the record, is not against the overwhelming weight of the evidence, and is further supported by the relevant case law and §287.220 of the Missouri Workers' Compensation Act. (Responding to Point II of Employer's Brief).

Claimant alleges that she is permanently and totally disabled and unable to compete in the open labor market. Section 287.020.7 of the Missouri Revised Statute defines total disability as the "inability to return to any employment and not merely ... [the] inability to return to the employment in which the employee was engaged at the time of the accident."

Though the evidence shows that Claimant is permanently and totally disabled, it does not support the Commission's conclusion that the Second Injury Fund is responsible, even in part. Claimant is permanently and totally disabled because of the primary leg injury alone. "Inability to return to any employment" means "that the employee is unable to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment." *Kowalski v. M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922 (Mo.App. 1982). The words "any employment" mean "any reasonable or normal employment or occupation; it is not necessary that the employee be completely inactive or inert in order to meet this statutory definition." *Id.*; *Brown v. Treasurer of Missouri*, 795 S.W. 2d 479, 483 (Mo.App. 1990).

The primary determination with respect to the issue of total disability is whether, in the ordinary course of business, any employer would reasonably be expected to employ the claimant in his or her present physical condition and reasonably expect him or her to perform the work for which he or she is hired. *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 367 (Mo.App. S.D. 1992); *Talley v. Runny Mead Estates, Ltd.*, 831 S.W.2d 692, 694 (Mo.App. E.D. 1992); *Brown*, 795 S.W. 2d at 483; *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 199 (Mo.App. E.D. 1990); *Sellers v. Trans World Airlines, Inc.*, 776 S.W.2d 502, 504 (Mo.App. 1989). The test for permanent and total disability is whether given the employee's condition, he or she would be able to compete in the open labor market; the test measures the employee's prospects for obtaining employment. *Reiner*, 837 S.W.2d at 367; *Brown*, 795 S.W.2d at 483; *Fischer*, 793 S.W.2d at 199.

Section 287.220 RSMo., provides as follows:

[I]f the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body as a whole injury or major extremity shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that **if** the compensation for which the employer at the time of the last injury is liable is **less** than the compensation provided in this chapter for permanent total disability, **then** in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the

employee shall be paid the remainder of the compensation that would be due for permanent total disability under Section 287.200 out of a special fund known as the "Second Injury Fund"... .

(Emphasis added). For the employer to be liable for permanent total disability, the claimant must prove that the work injury, independent of other factors caused him to permanently and totally disabled. *Moorehead v. Lismark Distributing Co.*, 884 S.W.2d 416, 419 (Mo.App. E.D. 1994).

Therefore, the first determination to be made is the extent of the compensation liability of the employer for the last injury, considered alone. *Hughey v. Chrysler Corp. and Treasurer of Missouri*, 34 S.W.3d 845, 847 (Mo.App. E.D. 2000); *Vaught v. Vaughts, Inc.*, 938 S.W.2d 931, 939 (Mo.App. S.D. 1997); *Roller v. Treasurer of State of Mo.*, 935 S.W.2d 739 (Mo.App. S.D. 1996). The next step is to determine the extent of preexisting disabilities. Only then does the fact finder determine whether the preexisting disabilities combine with disabilities from the primary injury to create permanent total disability. Where the combination of those disabilities cause permanent total disability, the Second Injury Fund is liable for permanent total disability, but only after the employer has paid the compensation due for the disability resulting from the primary injury. *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W.2d 173, 177-78 (Mo.App. E.D. 1995).

If the last injury considered alone renders Claimant permanently and totally disabled, then the Second Injury Fund has no liability, the employer is liable for the whole amount, and an analysis of the nature and extent of the preexisting injuries is moot.

Hughey, 34 S.W.3d at 847. In affirming the Commission's decision in this case, the Court of Appeals properly relied on the law as set forth in *Hughey* as well as the credible medical evidence, expert testimony and Claimant's testimony.

In the present case, the competent and substantial evidence in the record establishes that the primary February 27, 1999 accident and occupational disease of venous stasis acquired through 17 plus years at ICS alone caused Claimant to be permanently and totally disabled.

Here, there were several key factual findings made by the ALJ, unanimously adopted by the Commission and affirmed without dissent by the Court of Appeals. The ALJ found as facts the conclusions, explanations, and opinions of Dr. Altsheler, a doctor specializing in nephrology and board certified in internal medicine; the elements of Claimant's job as she described them; restrictions due to her legs alone since the primary February 1999 injury; and the fact that as recently as the few days before the February 1999 injury, Claimant did not have any open wound on either of her legs and she was performing her full and regular duties with Employer. (A. 42-43; 47-49; 63). Those findings support the conclusion that but for Claimant's primary leg injury, she could return to work.

With regard to the venous stasis condition in Claimant's legs, Dr. Altsheler explained how the condition developed and the resulting debilitating impact due to the primary February 27, 1999 traumatic injury at ICS. Dr. Altsheler testified that Claimant's current leg condition was caused by her 17 plus years of working at ICS. (Tr. 292). He further testified that Claimant sustained a traumatic event on February 27, 1999 when she

hit her left lower leg on a metal shelf and subsequently developed a non-healing wound on her left lower extremity. (Tr. 340-341). Only since that time, has Claimant been severely restricted in almost any type of activity that puts any degree of pressure on her system. Dr. Altsheler imposed significant restrictions upon Claimant's physical capabilities. (Tr. 293-294). Those restrictions did not exist prior to February 27, 1999. Dr. Altsheler opined that Claimant was literally paralyzed by this particular process. (Tr. 292-293). Any activity that increases pressure in the chest that would be transmitted down to the lower extremities, or any activity where her legs would be lower than her heart, would perpetuate the problem. (Tr. 292-294). This would include normal sitting, walking, bending, and stooping. When sitting, her feet have to be above her heart, and they cannot be equal to her hips. Claimant sat in this manner during the hearing with her legs propped up on pillows on top of a chair. (A. 47). Dr. Altsheler also filled out a form for Claimant so that she could get a disabled parking sticker. (Tr. 272). Claimant did not have any problems or restrictions driving prior to February 27, 1999. (Tr. 85). The lesion sustained as a result of the February 27, 1999 injury has not completely healed. Moreover, Claimant stopped working on March 17, 1999 because of an infection in the open wound that developed on her left leg after the February 27, 1999 injury. (Tr. 77).

Again, the medical expert opinions of Dr. Altsheler with respect to the condition of Claimant's legs, including causation and extent of disability, were accepted by the ALJ, the Commission and the Court of Appeals in ultimately finding Employer liable for permanent total disability. In evaluating different expert opinions, the Commission is entitled to

disbelieve any or all testimony of a witness even though no contradicting or impeaching evidence appears, and the Commission can reject the testimony of one physician in favor of another. *Roller*, 935 S.W.2d at 746. Deciding which conflicting medical theory to accept is a matter for the Commission. *Bruflat*, 933 S.W.2d at 835. When the Commission agrees with the ALJ on a credibility determination, such consistency is a powerful factor in favor of upholding the Commission's award on appeal. *Davis*, 903 S.W.2d at 571. Furthermore, when reviewing the record, the court views the evidence and legitimate inferences therefrom in a light most favorable to the Commission's award, and affirms the award if the Commission's decision is supported by competent and substantial evidence and is not clearly contrary to the overwhelming weight of the evidence. §287.495 RSMo. 2000; *Davis*, 903 S.W.2d at 571.

In the present case, the Court of Appeals agreed with the Commission's reliance on Dr. Altsheler's opinions and the Commission's conclusion that the last injury was the occupational disease of venous stasis, that it was caused by work conditions, that it became a compensable injury in 1999 and that it alone caused Claimant's permanent total disability. (A. 62-63). The ALJ believed and the Commission affirmed Dr. Altsheler's explanation that Claimant's venous stasis was a work-related condition, and as such, manifested different symptoms throughout Claimant's employment at ICS beginning in 1995, but did not rise to the level of a known compensable condition until 1999. (A. 42-43; 49). Although an accident occurred on February 27, 1999, the major symptoms that followed, including the open lesion on Claimant's shin, were predominately a symptom of the occupational venous

stasis disease, as opposed to the accident. (A. 43; 49). Dr. Altsheler agreed that Claimant's 17 plus years at work would be a substantial factor in the cause of her leg condition. (Tr. 292).

Dr. Altsheler further testified that Claimant is permanently and totally disabled as a result of her leg condition/venous stasis alone. (Tr. 314). These expert opinions of Dr. Altsheler were adopted by the Commission in finding Employer responsible for permanent total disability as a result of the primary injury and venous stasis condition considered alone. (A. 47-49).

Employer's argument that Dr. Poetz's opinions warrant greater weight than those of Dr. Altsheler in determining responsibility for permanent total disability is devoid of merit. The Commission unanimously affirmed the ALJ's award regarding the credibility of expert witnesses, the weight to be given to the expert opinions, and the ultimate finding that permanent total disability resulted from the last injury alone. (A. 48-49). Furthermore, the Court of Appeals found that even considering the contrary evidence, it is not overwhelming and does not require reversal. (A. 64).

While Employer argues that Mr. England testified Claimant was permanently and totally disabled and unable to compete in the open labor market due to the combination of her leg conditions with preexisting conditions of her shoulder and obesity (Employer's brief, p. 72-73), a closer examination of Mr. England's testimony establishes otherwise.

Mr. England admitted that the predominant factor in Claimant's permanent total disability was the limitations with her legs. (Tr. 135). As a result of the venous stasis, her

legs need to be elevated for most of the workday and Mr. England did not know of any job where an employee could work with her feet elevated above her heart. (Tr. 111). Claimant testified that as recently as the few days before February 27, 1999, she did not have any open wound on either of her legs. (Tr. 34). As of the primary February 1999 injury, Claimant was performing her work duties. (Tr. 124-125). Mr. England was aware of the restrictions imposed by Dr. Altsheler regarding Claimant's legs and that those restrictions limit Claimant to a less than sedentary range of activity. (Tr. 134). Furthermore, the ALJ found and the Commission affirmed that the significant restrictions imposed by Dr. Altsheler concerning Claimant's physical capabilities did not exist leading up to February 27, 1999. (A. 47; 49).

Employer also points to *Boring v. Treasurer of Missouri*, 947 S.W.2d 483 (Mo.App. E.D. 1997), in an effort to prove that Claimant's permanent total disability is due to a combination of prior and primary injuries. However, the facts in *Boring* are quite different than those in the present case. Therefore, Employer's reliance on this case does little to support its assertions.

In *Boring*, the court noted that the only expert testimony as to the cause of that claimant's total disability was that it was the result of the combination of a primary back injury and prior injuries and conditions. *Id.* at 489. Based upon a review of the evidence, the court found that the primary back injury alone was quite serious, but would have still left the claimant the opportunity of reemployment and that a prior pulmonary condition and coronary artery disease completely foreclosed any reemployment opportunities. *Id.*

In the present case, Dr. Altsheler not only imposed specific and significant restrictions upon Claimant due to her legs since the primary February 1999 injury, he also opined that Claimant is permanently and totally disabled as a result of the venous stasis condition alone. (Tr. 314). There were no permanent restrictions imposed upon Claimant due to the venous stasis condition just prior to bumping her leg and developing a non-healing wound in February 1999. It is only since the primary February 1999 injury that Claimant needs to have her legs elevated for a majority of the day as well as use a compression pump. (Tr. 55; 78). Mr. England opined that based upon the severe and significant restrictions imposed, Claimant is precluded from even sedentary employment. That opinion was based predominantly upon the condition of Claimant's legs since the primary February 1999 injury. (Tr. 109-110; 134-135).

When asked to consider Claimant's limitations, problems, the need for the compression pump, the need to keep her legs elevated for the majority of the day since February 27, 1999, and the limitations of jobs available in the open labor market that can accommodate that extent of limitations, Mr. England did not think there was a job Claimant could perform which her prior conditions (obesity and left shoulder) would prevent her from doing. (Tr. 135). Essentially, that testimony from Mr. England establishes that he did not identify any jobs Claimant could perform due to the primary February 1999 injury alone, without regard to her prior injuries or conditions.

Contrary to the finding in *Boring*, in the present case, the Commission properly found that the substantial and competent evidence established that Employer is responsible

for permanent total disability as a result of the primary injury and venous stasis condition alone. (A. 48-49).

The same analysis is true with respect to Employer's citations to *Vaught v. Vaughns, Inc.*, 938 S.W.2d 931 (Mo.App. S.D. 1997) and *Moorehead v. Lismark Distributing Co.*, 884 S.W.2d 416 (Mo.App. E.D. 1994). In *Vaught*, multiple medical experts opined that the claimant sustained varying degrees of permanent partial disability due to the last accident alone. *Vaught*, 938 S.W.2d at 940. In the present case however, Dr. Altsheler opined that Claimant is permanently and totally disabled as a result of the venous stasis condition alone. (Tr. 314). Just prior to bumping her left leg on February 27, 1999, Claimant did not have any open wound on either leg, she was performing full time regular duty at ICS, and she was under no permanent restrictions from any doctor because of her legs. (Tr. 34; 216-217).

In *Moorehead*, the claimant agreed at oral argument that no expert witness testified that the claimant was permanently and totally disabled as a result of the primary injury alone. *Moorehead*, 884 S.W.2d at 419. Here, an expert testified that Claimant is permanently and totally disabled as a result of the venous stasis condition in her legs alone. (Tr. 314). The venous stasis condition in Claimant's legs resulted from her 17 plus years of working at ICS, an occupational disease the Commission has properly found is the responsibility of Employer. The Commission was also correct in finding that primary injury and occupational disease of venous stasis is so severe that Claimant is unable to compete in the open labor market based upon that condition alone. (A. 48-49).

Contrary to the facts in the cases cited by Employer, in the present case, there is competent and substantial evidence establishing that the primary February 27, 1999 traumatic injury alone caused Claimant to be permanently and totally disabled. In support of this finding, the Court of Appeals relied on *Hughey* which holds that a claimant's preexisting disabilities are irrelevant until employer's liability for the last injury is determined. *Hughey*, 34 S.W.3d at 847, citing *Kizior v. Trans World Airlines*, 5 S.W.3d 195, 201 (Mo.App. W.D. 1999); *Roller*, 935 S.W.2d at 743-744.

Here, following the rationale in *Hughey*, the significant extent of problems and limitations due to Claimant's venous stasis condition, solely due to the February 1999 primary injury alone, render Claimant permanently and totally disabled. When asked to consider Claimant's limitations, problems, need for the compression pump, need to keep her legs elevated for the majority of the day since February 27, 1999, and the limitations of jobs available in the open labor market that can accommodate the extent of those limitations, Mr. England did not identify any job that Claimant could do that her prior conditions (obesity and left shoulder) would prevent her from doing. (Tr. 135).

Considering Claimant's primary leg condition alone due to the February 27, 1999 injury, she is precluded from even sedentary employment and the prior injuries or conditions are irrelevant. In accordance with the analysis and holding in *Hughey* as well as §287.220 of the workers' compensation statute, the competent and substantial evidence clearly establishes that Claimant is permanently and totally disabled as a result of the last

injury and occupational disease alone. Therefore, analysis of any preexisting disabilities is moot.

II. Claimant's preexisting venous stasis condition did not act as a hindrance or obstacle to employment and did not rise to a known compensable condition until the primary February 1999 incident. (Responding to Point II of Employer's Brief, p. 76-82).

Claimant alleged a specific February 27, 1999 accident and in the same claim, also alleged an occupational disease or repetitive injury from over 17 years of work at ICS. In its argument, Employer is trying to divide the primary injury into an accident and an occupational disease. That is a false distinction. The ALJ and Commission acknowledged that Claimant has an occupational disease of venous stasis which first became a known compensable condition in 1999. (Tr. 43). The ALJ and Commission further acknowledged that an accident did occur on February 27, 1999, but the major symptoms that followed that accident, including the open lesion of Claimant's shin, were predominantly a symptoms of the occupational disease. (Tr. 43; 49). The Commission found that the primary injury and venous stasis condition was so severe that Claimant cannot compete in the open labor market due to that condition alone. (A. 48-49).

After the February 27, 1999 injury, Claimant was ultimately referred to Dr. Altsheler for evaluation and treatment, a doctor who specialized in nephrology, for which Claimant's venous stasis condition is included. (Tr. 263). By virtue of extensive medical testing and records review, Dr. Altsheler concluded that work was the cause of Claimant's condition. (Tr. 288-293). The records of Dr. Mammen, Dr. Lee, and Dr. Carmody reflect that Claimant began to experience lesions in 1995 due to venous stasis. However, those lesions were amenable to treatment and healed in a month or two.

Dr. Altsheler opined that Claimant's venous stasis reached the point of debilitation and became a measurable disability on February 27, 1999 so that a minor traumatic injury, such as the incident that day, caused the non-healing wound to develop on Claimant's left leg and result in severe limitations. (Tr. 342-43).

Contrary to Employer's assertion that "the proper focus of the inquiry is on the potential that the pre-existing condition may combine with a future work related injury" (Employer's brief, p. 81), §287.220.1 clearly sets forth the correct analysis for determining liability of an employer and the Second Injury Fund. That section states in relevant part:

After the compensation liability of the employer for the last injury , considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission.....

The language in §287.220.1 is further reinforced by the holding in *Hughey* that the first determination to be made is the extent of the compensation liability of the employer for the last injury, considered alone. *Hughey*, 34 S.W.3d at 847. If the last injury considered alone renders Claimant permanently and totally disabled, then the Second Injury Fund has no liability, the employer is liable for the whole amount and an analysis of the nature and extent of the preexisting injuries is moot. *Id.*

Based upon the clear language in §287.220.1, the court's holding in *Hughey*, as well as the credible expert, medical, and Claimant's testimony in this case, Employer's emphasis on the degree of problems Claimant had prior to February 27, 1999 due to her legs, left shoulder and/or weight are completely irrelevant, because the analysis of disability must start with the last injury alone. Therefore, the ALJ, the Commission and the Court of Appeals were all proper in finding Employer responsible for permanent total disparity based upon the last injury, that of February 27, 1999, in and of itself. (A. 49; 63).

Appellant's reliance on cases such as *Wuebbeling v. West County Dry Wall*, 898 S.W.2d 615, 620 (Mo.App.E.D. 1995), *Carlson v. Plant Farm*, 952 S.W.2d 369 (Mo.App.W.D. 1997), *Garibay v. Treasurer of Missouri*, 930 S.W.2d 57 (Mo.App.E.D. 1996), and *Messex v. Sachs Electric*, 989 S.W.2d 206 (Mo.App.E.D. 1999) are therefore misplaced.

Pursuant to §287.220.1, after the compensation liability of employer for the last injury, considered alone, has been determined, the degree or percentage of disability attributable to all injuries or conditions existing at the time the last injury was sustained, shall then be determined. §287.220.1, RSMo (2000). The words in that section-- "at the

time the last injury was sustained”-- are extremely important. Applying the plain and ordinary meaning of the statute to the present case, the degree of pre-existing disability in Claimant’s legs, if any, with regard to the venous stasis condition, must be determined as of February 27, 1999.

Here, while Claimant had lesions on her legs at times in the past, those lesions healed with medical treatment. (Tr. 29-30). As recently as a month or two before the primary February 27, 1999 incident, Claimant did not have a lesion on either leg. (Tr. 34). As of February 27, 1999 injury, Claimant was performing her full duties as a machine operator. (Tr. 124-125). Claimant’s bump of her left leg on February 27, 1999 resulted in significant and severe limitations being imposed. Only then did the venous stasis condition rise to the level of a known compensable condition, one that caused permanent total disability.

As referenced earlier, the ALJ and the Commission adopted the opinions of Dr. Altsheler in finding Employer liable for permanent total disability based upon the primary February 27, 1999 injury alone in and of itself. (A. 48-49). Appellant has already had two opportunities to argue the credibility and weight of medical and vocational expert opinions in reference to issues of causation and permanent disability. The Commission’s determination that one of two competing medical opinions is correct is binding on appeal. *Brufat*, 933 S.W.2d at 895. When the Commission affirms or adopts the findings and award of the ALJ, the resulting consistency is a powerful factor in favor of upholding the Commission’s award on appeal. *Davis*, 903 S.W.2d at 571. Furthermore, the Court of

Appeals found no clear abuse of discretion in the Commission's choice of Dr. Altsheler's expert opinion in this case. (A. 62).

Therefore, in accordance with the analysis and holding in *Hughey*, as well as §287.220 of the workers' compensation statute, the competent and substantial evidence establishes that Claimant is permanently and totally disabled as a result of the last injury and venous stasis condition alone. Based upon this finding, there is no reason to examine the extent of any prior disability, whether it be Claimant's legs, shoulder or obesity. Analysis of any preexisting disabilities is irrelevant.

CONCLUSION

For the reasons stated above, the Court should affirm the findings and conclusions of the Commission referable to both the 1997 and 1999 claims, or retransfer the case to the Court of Appeals.

Respectfully Submitted,

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Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this 30th day of January, 2003, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned certifies that the foregoing brief complies with the limitations contained in Special Rule 1, and that the brief contains 9670 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

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